Supreme Court, U.S.
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No. 95-412

In The

Supreme Court of the United States

October Term, 1995

GINA SHAW,

Petitioner,

v.

JAMES K. HAHN, JOHN EMERSON, JAMES PEARSON, THOMAS HOKINSON, CORY BRENTE, CITY OF LOS ANGELES, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY ON WRIT OF CERTIORARI

STEPHEN YAGMAN
MARION R. YAGMAN
YAGMAN & YAGMAN, P.C.
723 Ocean Front Walk
Venice, California 90291
(310) 452-3200

Attorneys for Petitioner, Gina Shaw

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OR CALL COLLECT (402) 342-2831

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Petitioner submits the following points in reply to Respondents' Brief in Opposition to the Petition for Certiorari.

A NUMBER OF RESPONDENTS' CONTENTIONS ARE WITHOUT MERIT OR ARE INCORRECT.

1. A JUROR'S RIGHT NOT TO BE EXCLUDED FROM A JURY IS AN INDIVIDUAL, AND NOT A COLLECTIVE RIGHT.

At page five of the Brief in Opposition, Respondents seek to convince this Court that the right of jurors not to be excluded from juries is a collective, and not an individual right. Respondents are incorrect, and ignore this Court's holding in *In re Gault*, 387 U.S. 1, 19-20 (1967), Pet. at 5 and 7, that constitutional rights are individual, and are not collective, rights. Respondents simply ignore Petitioner's citation of *Gault* for the correct proposition – all constitutional rights are individual, and not group, rights – and do not discuss this point. Rather, Respondents incorrectly urge that this Court's decision in *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320 (1970), decided by this Court after it decided *Gault*, necessarily, because it involved its own fact-specific class claims, is limited to the proposition, and limits *Powers v. Ohio*, 111 S.Ct. 1364 (1991), to the proposition that only as a group may jurors state a claim based on alleged racial exclusion from a jury. Respondents' contention in this regard flies in the face of *Powers* and *Gault*, and nothing set forth in any of the pertinent cases suggests that juror rights as defined in *Carter* and *Powers* may be asserted only as

group rights and may not be asserted as individual rights.

2. *CARTER* IS NOT LIMITED IN ITS APPLICATION TO CLAIMS FOR ONLY DECLARATORY OR INJUNCTIVE RELIEF.

At page six of the Brief in Opposition, Respondents set forth their precatory contention that *Carter* is limited to claims for declaratory or injunctive relief, because, in *Carter,* the claims made were for declaratory and injunctive relief. There simply is no support for Respondents' contention in this regard. Respondents' claim that, to their knowledge, "neither this court [*sic*] nor any circuit court has previously considered [*sic*] the question of whether the 'suit' contemplated by *Powers* would encompass the creation of the cause of action for damages pled by the individual juror in the lawsuit below[,]" would have force only if this Court never had decided *Powers. Powers* clearly provides for a cause of action, individually, for a juror who claims she or he has been excluded from a jury based on race. Clearly, *Carter* and *Powers* together stand for the proposition that the claim made by Petitioner in this case is cognizable in the federal courts under 42 U.S.C. 1983.

Thus, contrary to Respondents' contention, the decision of the court below *is* in conflict with the controlling authority of this Court on this precise issue.

3. THE COURT BELOW DECIDED IMPLIEDLY THAT NO JUROR EVER COULD STATE A CLAIM COGNIZABLE UNDER POWERS.

Contrary to Respondents' contention, the court below impliedly decided that even a juror excluded from a jury in a case in which a party did not make a *Batson* challenge never could state a claim for discrimination against a juror based on race.

This is so because the well-developed law of issue preclusion provides that a plaintiff who is barred from relitigating a claim because she or he is subjected to collateral estoppel, is so barred whether or not the claim actually was litigated, *if it could have been litigated* in the prior action. *See, e.g., Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979). Thus, because a *Batson* challenge always may be raised in a trial in which a juror may have been excluded on racial grounds, collateral estoppel always would operate to bar the juror from relitigating that claim – even if no *Batson* challenge had been made. No doubt here, had the plaintiff in the underlying action not made the *Batson* challenge, and had Petitioner herein brought her suit, Respondents would be arguing that since the *Batson* challenge could have been, but was not, raised and litigated in the underlying action, therefore, nevertheless, Petitioner would be barred from pursuing her present action. Under Respondents' contention, Petitioner always would lose and never could raise a claim such as the one she raises. That would render meaningless this Court's holding in *Powers.*

4. ISSUE PRECLUSION WAS NOT PROPERLY PROVED BY RESPONDENTS.

As is set forth in the Petition, assertion of issue preclusion must be founded on the several criteria that warrant its application. Thus, Respondents' contention that Petitioner's action is a "procedural device of filing a separate lawsuit[,]" Br. Opp. at 8, is incorrect. Instead, because there simply was no full and fair opportunity to litigate the identical issue in the underlying action, there may not be defensive use of collateral estoppel. Indeed, no damages were available in the underlying action in favor of Petitioner herein, and thus, in no wise could Petitioner ever have gotten relief for herself in the prior action, no matter what its outcome. With the *Batson* challenge denied with there not having been a full and fair opportunity to litigate its merits, no remedy was available; and had the challenge been allowed, there would be no cause of action, thus rendering *Powers* a dead letter. Such a scenario is illogical.

Because the arguing of the *Batson* challenge for a few brief minutes at sidebar in the underlying action was neither a litigation of the identical issue nor a full and fair opportunity to litigate any issue, collateral estoppel is inapplicable, and in no event is Petitioner's action a "procedural device."

There is no issue about Petitioner litigating the same issue twice, and Respondents' characterization of the controversy as one "simply [in which] the interest [Petitioner] is asserting . . . [is] a constitutional right[,]" Br. Opp. at 9, trivializes both the Constitution and this Court's opinion in *Powers*.

What Respondent seeks, in reality, is the ability to exclude potential jurors from juries based on race, and for such excluded jurors to have no remedy at all. This makes a mockery of the right to equal protection against racial discrimination.

There is no showing whatever that the predicate elements for application of collateral estoppel ever were met in this case.

Contrary to Respondents' contention, Br. Opp. at 10, that this Court previously found that "the juror's rights will be fully and fairly litigated by the use of the procedures outlined in *Batson*[,]" *ibid.*, such is not the case. What this Court found was that it would be awfully difficult for a juror ever to litigate her or his right to equal protection against a racially based peremptory challenge, and that therefore, there would be third party standing to assert that right. Such conference of third party standing could not have been intended to strip from a juror her or his own, first party, right to claim racial discrimination. If the contrary were true, then, in effect, an exception would nullify a rule that permitted seeking relief for a constitutional violation. That would be absurd.

5. THIS COURT'S PRECEDENTS DO AUTHORIZE SUIT BY A JUROR WHO CLAIMS EXCLUSION FROM A JURY BASED ON RACIAL GROUNDS.

At pages 12-13 of the Brief in Opposition, Respondents boldly claim that this Court's precedents of "*Carter* and *Powers* do not authorize the maintenance of independent causes of action for damages after the court has

engaged in a *Batson* inquiry and found no constitutional violation." They are incorrect, both for the reasons set forth in the Petition, the reasons set forth above, and because this Court's precedents clearly *do authorize* a suit by a juror who has been excluded from a jury based on racial grounds. There was no full and fair opportunity for the litigation of the claim now advanced by Petitioner in her suit in the prior suit, and, in any event, both what the court below did and what is urged by Respondent completely would do away with the right of a juror to redress the harm to her or to him that flows from exclusion from a jury based on the ground of race.

6. CONCLUSION

Because this Court clearly established a right of jurors to sue for exclusion from a jury based on race, because conference of third party standing, via a *Batson* challenge, on parties litigant to challenge the exclusion from a jury of any person based on racial grounds could not have been intended to strip from jurors first party standing to raise their own, individual claims of racial discrimination, and because, in this case, there was no full and fair litigation of the identical issue in the underlying litigation, the court below both erred and acted so as to nullify completely a right established by this Court.

Therefore, this Court should grant the Petition for Certiorari.

Respectfully submitted,

STEPHEN YAGMAN
MARION R. YAGMAN
YAGMAN & YAGMAN, P.C.
723 Ocean Front Walk
Venice, California 90291
(310) 452-3200

Attorneys for Petitioner,
Gina Shaw